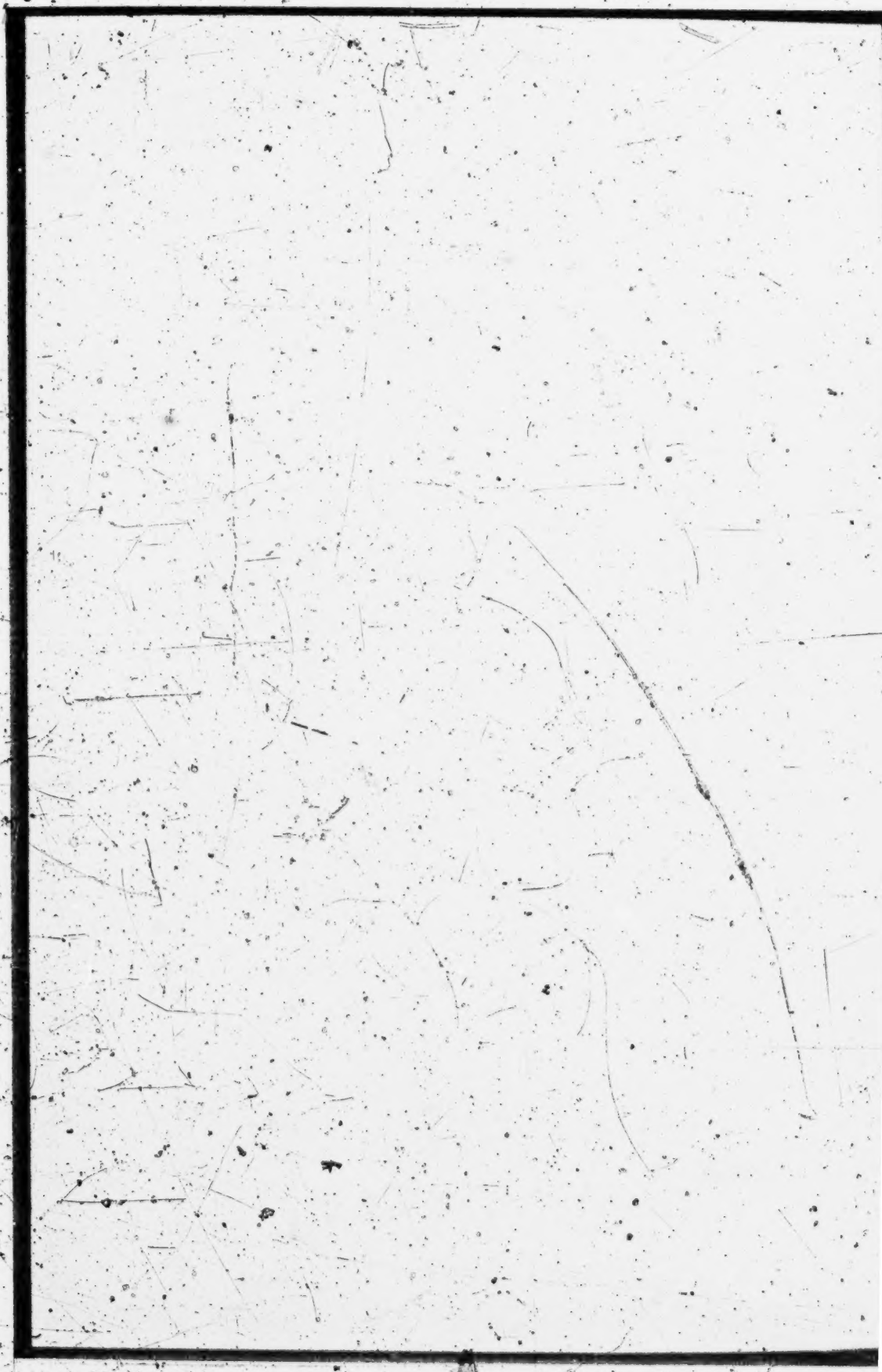

No. 672

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN P. KING

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion and order of the United States Court of Claims (Petition, Appendix, 1A-30A) are reported in 182 Ct.Cl. 631, 390 F.2d 894.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The question presented in the petition (Pet. 2) is: Whether the Declaratory Judgment Act (28 U.S.C. § 2201,

et seq) grants the Court of Claims jurisdiction to enter declaratory judgments against the United States.

It is respondent's position this is not the question at issue. It is not a question of the Declaratory Judgment Act granting "jurisdiction" to the Court of Claims. The matter which the decision of the Court of Claims resolved was that the Declaratory Judgment Act is applicable to the Court of Claims and, specifically, to respondent's case. Hence, the question before the Court is:

> Whether the Declaratory Judgment Act (28 U.S.C. § 2201, *et seq*) applies to the United States Court of Claims.

STATUTES INVOLVED

The petition (Pet. 2) does not recite all statutes pertinent to this Court's consideration of the question as to whether the Declaratory Judgment Act applies to the United States Court of Claims.

The petitioner merely recites (Pet. 2) 28 U.S.C. § 1491 (Claims against the United States) (i.e. The Tucker Act)[1] and 28 U.S.C. § 2201 (i.e. The Declaratory Judgment Act).[2] It did not recite the pertinent provisions of

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[1] 28 U.S.C. § 1491, The Tucker Act, provides:

> § 1491. Claims against United States generally * * *
>
> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

[2] 28 U.S.C. § 2201, The Declaratory Judgment Act, provides:

> § 2201. Creation of remedy
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 451 (Definitions) (Act of June 25, 1948, Ch. 646, 62 Stat. 869, 907).

28 U.S.C. § 451 (Definitions) provides, in pertinent part:

> § 451. Definitions
>
> As used in this title:
>
> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

STATEMENT

The petition does not recite the full facts pertinent to the question of the applicability of the Declaratory Judgment Act to the United States Court of Claims and, in part, errs in recital of the facts.

The undisputed facts relating to this proceeding, as shown by the petition and answer filed in the United States Court of Claims (certified and filed with this Court) are as follows:

(1) On May 14, 1959 an Army Physical Evaluation Board (PEB) found respondent unfit for active duty by reason of physical disability.[3] The PEB recommended his placement on the Temporary Disability Retired List[4] and reevaluation as provided by law (Ct.Cl. Pet., Para. 4, P. 2). On June 18, 1959 the Army Physical Review Council (APRC) reviewed the PEB action and found re-

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[3] The PEB was convened under the provisions of 10 U.S.C. 1201 *et seq* and implementing Army regulations, i.e. Army Regulations 635-40A, dated August 13, 1957 and Army Regulations 635-40B, dated August 13, 1957.

[4] See: 10 U.S.C. 1202.

spondent fit for duty, i.e. not disabled (Ct.Cl. Pet., Para. 5, P. 2). On July 7, 1959 respondent rebutted the PRC findings (Ct.Cl. Pet., Para. 6, Page 3). On July 21, 1959 the Army Physical Disability Appeal Board (APDAB)[5] concurred with the APRC and, as a result, respondent was retired for longevity on July 31, 1959 (Ct.Cl. Pet., Para. 7, Page 3) under the provisions of 10 U.S.C. § 3911, § 3991 rather than 10 U.S.C. § 1201 *et seq.*

(2) On August 22, 1959 respondent filed an application for correction of military records with the Army Board for Correction of Military Records (ABCMR) requesting his records be corrected to show him retired by reason of physical disability (Ct.Cl. Pet., Para. 8, Page 3).[6] The ABCMR held a hearing on January 25, 1961 (Ct.Cl. Pet., Para. 14, Page 4). Thereafter, the application was formally denied by the Under Secretary of the Army on May 19, 1961 (Ct.Cl. Pet., Para. 16, Page 4).

Having accrued over thirty years of service for pay purposes, the gross amount of respondent's longevity retirement pay is equal to 75% of the monthly basic pay of a Colonel. Were plaintiff retired by reason of physical disability (either pursuant to the disability evaluation proceedings conducted prior to retirement or pursuant to a retroactive correction of his records[7]) the maximum

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[5] The petition (Pet. 3) alleges the Physical Disability Review Board, rather than the Physical Disability Appeal Board, considered respondent's case subsequent to retirement. This is in error. The Physical Disability Appeal Board considered respondent's case on July 21, 1959 prior to his retirement on July 31, 1959.

[6] The application was filed under the provisions of 10 U.S.C. § 1552 and Army Regulations 15-185, dated July 18, 1955, the Army's implementing regulation.

[7] Had the application under 10 U.S.C. § 1552 been granted respondent's records would have been retroactively corrected to show his retirement by reason of physical disability on July 31, 1959. If his records had been corrected to show retirement by virtue of such a retroactive correction of his records respondent would have been paid all physical disability retired pay due from July 31, 1959

disability retirement pay rate (i.e. 75%) would have been, and would be, the same as that for longevity. The action of the Secretary of the Army (acting by and through the PEB, APRC and APDAB prior to July 31, 1959, and the Under Secretary and ABCMR subsequent to July 31, 1959) denied respondent that portion of his retired pay which if retired for physical disability is automatically exempt from income taxation under 26 U.S.C. § 104(a)(4) (Pet. 2A).

Respondent brought this action in the Court of Claims, alleging that "[t]he action of the Secretary of the Army in failing to grant plaintiff physical disability retirement pay was arbitrary, capricious, not supported by the evidence and contrary to law and regulation" (Ct.Cl. Pet., Para. 17, Page 5). Respondent seeks a "judgment against defendant for physical disability retirement with retired pay equal to 75% of the pay of a Colonel * * * less such net retirement pay for years of service heretofore paid to plaintiff" (Ct.Cl. Pet., Page 6), i.e. "for the difference—equal to the federal taxes assessed on his retirement pay—between disability pay and the longevity compensation he has received after taxes" (Pet. 2A).

Petitioner's first affirmative defense was that the respondent's claim was "basically a claim for a refund of taxes" and, therefore, barred by respondent's failure to allege the filing of a timely claim for refund with the Internal Revenue Service under 26 U.S.C. § 7422(a). In acting on petitioner's motion to dismiss, the Court of Claims issued an order (Pet. 2A, n.1) upholding, in effect, the Government's first affirmative defense and suggested that the sole relief which respondent could then possibly have from the court would be a declaration of his right to be retired for physical disability and to have his records changed accordingly. Because of the history of

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as a result of the correction, the amount of which would have equaled the amount of the taxes withheld from his longevity retired pay.

the point in the Court of Claims (Part I, decision below, Pet. 4A-10A) and on account of petitioner's explicit challenge (in its motion to dismiss) to the Court's authority to give declaratory relief, the Court invited reconsideration (Pet. 3A) of the applicability of the Declaratory Judgment Act to the Court of Claims and respondent's case. The Court of Claims requested briefs on the applicability of the Declaratory Judgment Act to "this court and this case" (Pet. 2A, n.1). Briefs were filed and the point argued (Pet. 4). Thereafter, the Court rendered its opinion of February 16, 1968. In its opinion the Court of Claims accepted respondent's contention (Pet. 29A-30A) that this was not an action "with respect to federal taxes"; that the determination which respondent requests is not a determination of tax liability; that the interpretation and application of 26 U.S.C. 104(a)(4) is "totally irrelevant to the questions [respondent] seeks to place before [the Court of Claims]" noting (Pet. 30A, n.42) there was "no question that §104(a)(4) of the Internal Revenue Code would exempt his retirement pay for income tax if he were held retired for disability"; that the only question presented, or need be presented, relates to respondent's retirement from the Army; and that respondent's "tax motives have absolutely no bearing on the application of the declaratory remedy" (Pet. 30A).

The Court of Claims held that the Declaratory Judgment Act does apply to the Court of Claims and to this case (Pet. 29A). In rendering its decision the Court of Claims overruled its decision in *Twin Cities Properties, Inc.* v. *United States*, 81 Ct.Cl. 655 (1935) (Pet. 13A) wherein it was held that the Declaratory Judgment Act (48 Stat. 955, 1934) did not apply.

In determining that the Declaratory Judgment Act applied the Court stated (Pet. 22A):

> "All we hold today is that claimants with this type of case traditionally within our purview—claims against the Federal Government with a money cast,

money-oriented, related to the immediate or ultimate recovery of money (administratively or judicially) from the United States—can seek declaratory judgments from us (if the other proper requisites exist) although they are unable to request or obtain a money judgment. That use of the Declaratory Judgment Act will surely not extend our jurisdiction or contravene 28 U.S.C. § 1491, *supra*. Whether there are other classes (i.e., non-money-related cases) in which a declaratory proceeding can validly be offered by this court we leave open for further development. At the least, plaintiff's category falls this side of the jurisdictional boundary."

The Court of Claims denied the motion to dismiss and granted respondent leave to amend his petition (Pet. 30A) "to seek explicitly a declaration of his right to be retired for disability and to have his military records changed". The case was "then to be returned to the trial commissioner for further proceedings". The petition was amended March 8, 1968. Petitioner filed a motion for reconsideration on March 15, 1968 and an answer to the amended petition on March 29, 1968. The motion for reconsideration was denied without opinion on June 14, 1968. Petitioner then filed its petition.

ARGUMENT

The decision below is (A) plainly correct, (B) not in conflict with any court of appeals decision, and (C) of evidently small importance to the Government's functions or operations.

I.

The Decision Below Is Plainly Correct

The decision below which the Court is asked to review is plainly correct. The decision below reflects an appreciation of the express intent of the Congress that "any court of the United States" may employ the procedural remedy available under the Act. The United States Court of Claims is a "court of the United States" as defined in 28 U.S.C. § 451 so there can be no question that within

the bounds of the subject matter of its jurisdiction, the Court has access to the remedy provided for in the Declaratory Judgment Act.

In relation to the correctness of the decision below, respondent does not consider that he can; by argument, add to the exhaustively researched and compelling opinion of Judge Davis holding that the Declaratory Judgment Act applies to the Court of Claims and this case. Respondent merely notes here the outline of the opinion's development, in order that the arguments of the petition may be placed in context, and then offers comment on the petition.

The opinion of the United States Court of Claims on the issue of the applicability of the Declaratory Judgment Act follows this path: (1) The existing precedents contain no decision of the Supreme Court or of a court of appeals holding that the Court of Claims is without power to enter a declaratory judgment in cases within its Tucker Act jurisdiction. The Court of Claims so held in *Twin Cities Properties, Inc.* v. *United States*, 81 Ct.Cl. 655 (1935),[8] and that case has been followed, explicitly or implicitly, in two Court of Claims and two district court cases where the issue was squarely presented. *Twin Cities* has been ignored and declaratory judgments issued under a number of other statutes authorizing suit against the United States (Pet. 4A-10A).[9] (2) The precedents upon

[8] Prior to the revision and codification of the Judicial Code in 1948.

[9] Particularly noteworthy were Judge Davis' observations (Pet. 8A-9A) that in *Raydist Navigation Corp.* v. *United States*, 144 F.Supp. 503 (E.D.Va. 1956) it was held that a court having Tucker Act jurisdiction of actions against the Government may grant a declaratory judgment; and that, with respect to comparable Government litigation under the Federal Tort Claims Act, the remedy of a declaratory judgment was deemed to be "at least a 'procedural step' toward obtaining damages", citing *Pennsylvania R.R.* v. *United States*, 111 F.Supp. 80, 85-89 (D.N.J. 1953). In citing the latter authority, Judge Davis pointed out that the Tort Claims Act gives the district courts exclusive jurisdiction of "civil actions on claims against the United States, *for money damages*" 28 U.S.C. § 1346(b) (1964) (emphasis in original).

which the money judgment theory of *Twin Cities* rested dealt with specific equitable relief not requests for declaratory judgments; declaratory judgment procedures are entirely consistent with the historic jurisdiction and practice of the Court; declaratory judgments do not embody specific relief; the Court of Claims "money judgment" is itself merely declaratory; to countenance declaratory proceedings in the Court of Claims would not subject the Government to strange and alien practices, the United States has instituted many declaratory proceedings[10] and declaratory relief against the public officer is commonplace (Pet. 12A-18A). (3) Declaratory procedures do not go to jurisdiction and their availability cannot and will not be used to expand the subject matter jurisdiction of the Court of Claims beyond the money-related confines of the Tucker Act. The essential elements of a "claim" under the Court's jurisdictional statute (28 U.S.C. § 1491 (1964)) historically involve controversies with a money cast; that for a suit to have a money cast does not require that the plaintiff immediately seek such a judgment (Pet. 19A-22A). (4) The 1948 revision and codification of the Judicial Code added a new Section 451 (28 U.S.C. § 451) expressly including the Court of Claims in the term "court of the United States". Since the Declaratory Judgment Act, as revised, allows "any court of the United States" to grant declaratory relief, the 1948 Code undeniably indicates, if its phrasing is taken at face value, that the Court of Claims possesses the power to issue a declaratory judgment. Nothing in the legislative history indicates that the words should not be accepted as they

[10] In this regard, it is most significant that on September 27, 1968, in the case of *United States* v. *Reynolds Metals Company*, (Civil Action 2421-68) the petitioner here filed a complaint in the United States District Court for the District of Columbia seeking a declaratory judgment under the provisions of the Declaratory Judgment Act (28 U.S.C. § 2201) in litigation involving a claim of $7,898,479.00. By praecipe filed October 25, 1968, the action was dismissed without prejudice in view of institution of litigation "on the same claim" by *Reynolds Metals Company* in the United States Court of Claims.

were used (Pet. 23A-28A). (5) The determination which respondent requests [4] is not a determination of tax liability. The interpretation and application of tax statutes is totally irrelevant to the questions he seeks to place before the Court. The only questions respondent presents, or need present, relate to his retirement from the Army. Those are the only issues with which the Court of Claims would treat in its further proceedings in the case. In the circumstances, respondent's tax motives have absolutely no bearing on the application of the declaratory remedy (Pet. 29A-30A).

From the wealth of material organized in the decision below, the petitioner selects only two areas for attack, and that attack is of formulary rather than substantive nature.

The main thrust of the petitioner is its first argument that the Declaratory Judgment Act does not expand the jurisdiction of any court (Pet. 5-7). The court below and the respondent agree.[12]

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[4] Whether he should have been retired by reason of physical disability and whether his records should have been corrected, under 10 U.S.C. § 1552, to show his retroactive retirement by reason of physical disability, whereby all of his retired pay, retroactively to moment of disability retirement on July 31, 1959, would have been deemed disability retired pay.

[12] It is well established that the "operation of the Declaratory Judgment Act is procedural only" (*Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240, 1937), a fact which petitioner itself recognizes (Pet. 6). As was pointed out by Judge Davis: "The Supreme Court has unequivocally held that, with the enactment of the federal statute, 'Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction' ". The opinion below (Pet. 19A) points out that this Court said that "jurisdiction" in this context "means the kinds of issues which give right of entrance to federal courts". *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). As the opinion below also noted (Pet. 19A, n.26), in *Skelly Oil Co.* v. *Phillips Petroleum Co., supra*, the Court added: "The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked." (339 U.S. at 671-672).

The petitioner goes on, however, to assert that the Court of Claims has jurisdiction only to enter a "money judgment" (Pet. 7-8). Nothing in 28 U.S.C. § 1491 so provides. Moreover, the petition is completely silent as to the interrelationship of the precise language of 28 U.S.C. § 451 and 28 U.S.C. § 2201 with the provisions of 28 U.S.C. § 1491. Instead, the petition relies on the shorthand which originated in *United States* v. *Alire*, 6 (73 U.S.) Wall. 573 (1867), and *United States* v. *Jones*, 131 U.S. 1 (1889).[13] In a similar vein, the petition cites *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962) (Pet. 7) wherein it was held: "From the beginning it [the Court of Claims] has been given jurisdiction only to award damages * * *." (At Page 557). In this regard, it is to be noted that the sole authorities relied on by the Court in *Glidden* were *United States* v. *Alire*, *supra* (1867) and *United States* v. *Jones*, *supra* (1889) both decided before the 1934 statute and the 1948 Code revision. Equally significant, the Court in *Glidden Co.* v. *Zdanok*, did not address itself to the applicability of the Act to the Court of Claims. To supplement its money judgment argument petitioner points to other cases (Pet. 7) which held that the Court of Claims could not issue mandamus,[14] could not determine an equitable claim for relief,[15] could not remand a case to an administrative agency,[16] could not direct specific performance,[17] and could not grant nomi-

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[13] Both *Alire* and *Jones* were decided long before the enactment of the Declaratory Judgment Act in 1934, and the revision and codification of the Judicial Code in 1948 whereby the Declaratory Judgment Act was amended to include "any" court of the United States, and the inclusion of the United States Court of Claims within the definitions of 28 U.S.C. 451 pertaining to "courts of the United States".

[14] *United States* v. *Alire*, *supra* (1867).

[15] *Bonner* v. *United States*, 9 (76 U.S.) Wall. 573 (1869).

[16] *United States* v. *Jones, Receiver*, 336 U.S. 641 (1949).

[17] *United States* v. *Jones*, 131 U.S. 1 (1889).

nal damages.[18] All of these cases, with the exception of *United States* v. *Jones, Receiver, supra*, were decided before the 1948 Judicial Code revision. In *United States* v. *Jones, Receiver*, decided April 18, 1949, while referring to the short-hand "money judgment" jurisdiction of the Court of Claims in comparison to district courts, and in noting the provision for judicial review under the Administrative Procedure Act (§ 10, 60 Stat. 243, June 11, 1946, 5 U.S.C. 701, *et seq.*) (including declaratory judgments), the Court did not consider, or speak of, the applicability of the Declaratory Judgment Act to the Court of Claims in the light of the 1948 Code revision providing that the Declaratory Judgment Act applies to "any" court of the United States (336 U.S., at Pages 671-672). Petitioner cites *Rolls-Royce Ltd., Derby, England* v. *United States*, 176 Ct.Cl. 694, 364 F.2d 415, decided July 15, 1966 (Pet. 8), in support of its claim that the Court of Claims itself has held that it had no jurisdiction to enter declaratory judgments. A reading of the holding in *Rolls-Royce Ltd., Derby, England* v. *United States* shows that the Court did not rule that the Declaratory Judgment Act does not apply to the Court of Claims.[19]

After the Declaratory Judgment Act a claim looking to the payment of money can result in either a money judgment or a declaratory order. The subject matter of the jurisdiction of the Court of Claims is not in any way

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[18] *Grant* v. *United States*, 7 (74 U.S.) Wall. 331, 338 (1868); *Marion & Rye Valley Railway Co.* v. *United States*, 270 U.S. 280 (1926); *Nortz* v. *United States*, 294 U.S. 317, 327 (1935); *Perry* v. *United States*, 294 U.S. 330, 355 (1935).

[19] In its opinion the Court indicated that it was only concerned with the resolution of a jurisdictional question in connection with a counterclaim between two private parties (i.e. intervenor's counterclaim against plaintiff). There, the Court of Claims held that this portion of the counterclaim went beyond the jurisdiction of the Court since the Court had no jurisdiction over a private party's action for breach of contract against the plaintiff and that it followed that the Court could not circumvent its lack of jurisdiction by granting the private party the relief it sought under the Declaratory Judgment Act.

enlarged by this additional remedy. If the action is within the Tucker Act, the only inquiry is whether there is any reason to believe that the Congress did not intend the declaratory remedy to be available, as it provided in terms in 1948. The opinion below shows comprehensively and clearly that the remedy is entirely appropriate to Tucker Act proceedings and the petition offers nothing to the contrary.

The petitioner's second argument is that the decision amounts to a waiver of sovereign immunity not expressly sanctioned by statute (Pet. 9-10).[20] Insofar as this petition is concerned this is simply a rephrasing of its "money judgment" argument. As 28 U.S.C. § 1491 authorizes suits on, e.g. any regulation of an executive department, no additional waiver is required in authorizing in such a suit declaratory relief as well as a so-called "money judgment" which is itself simply a non-coercive declaration that the plaintiff should be paid by the accounting officials. Again, petitioner has failed to reconcile the very clear language of 28 U.S.C. § 451, 28 U.S.C. § 2201, and 28 U.S.C. § 1491. In simplest terms, 28 U.S.C. § 451 includes the Court of Claims within the definition of "courts of the United States". 28 U.S.C. § 2201 provides that "any court of the United States" may "declare the rights and other legal relations of any interested party seeking such declaration" in a matter within its jurisdiction and, as in this case, the Court of Claims, under 28 U.S.C. § 1491 has jurisdiction to render judgments, among other things, with respect to "any regulation of an executive department". Clearly, no new jurisdiction and no new subject matter is added by expanding the procedural remedy. Moreover, petitioner also ignores those cases wherein it has instituted proceedings seeking declaratory relief which, insofar as respondent knows, and as aforementioned, occurred most recently in Tucker Act type of litigation filed in the United States District Court for the

[20] The opinion below carefully reviewed this point (Pet. 4A-8A).

District of Columbia in *United States* v. *Reynolds Metals Company* (CA 2412-68) on September 27, 1968.

In addition to the foregoing considerations, respondent notes that the petition takes no issue with the careful review of the legislative history of the Declaratory Judgment Act by the court below (Pet. 24A-28A). Nor does it comment upon a subsequent legislative development. S.1704, 90th Congress, would authorize the Court of Claims to issue all orders available to a district court in a suit against the United States. S.1704 did not reach the House Committee for consideration (the 90th Congress adjourned October 14, 1968) but passed the Senate on July 29, 1968 after a report which accepted as correct the present decision.[21] In this regard, a significant corollary to the recognition by the Court of Claims of the applicability of the Declaratory Judgment Act is that it precludes the necessity for a litigant in the Court of Claims "splitting" his cause of action in order to seek declaratory relief in one forum and money damages in another forum. Ultimately, this would inevitably entail a reduction in the duplication and multiplicity of litigation which is ever pressing on the federal judiciary.

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[21] S. Rpt. No. 1465, 90th Cong., 2d Sess. (July 25, 1968), p. 3, reads:

"Declaratory judgment actions also present an area in which there is a need to broaden the Court of Claims remedial power. In *John P. King* v. *United States* (Ct. Cl. 1968), the power of the Court of Claims to grant declaratory judgments pursuant to 28 U.S.C. 2201-2202 was established. However, at present the power of the court to grant further relief as an adjunct to its declaratory judgments is not clear. The enactment of S. 1704 will broaden the relief which the court can give a claimant pursuant to 28 U.S.C. 2202 where the court decides that a claimant is entitled to a declaratory judgment but cannot recover any money. For example, an illegally discharged Government employee may, after the passage of S. 1704, bring a suit in the Court of Claims to recover back pay and, at the same time, seek restoration of his former position. If the evidence demonstrates that the employee's earnings during the period of his illegal discharge exceeded his Government pay, the court's judgment on the illegal discharge would be limited to a declaratory judgment, but it could as an incident of such a judgment order him reinstated."

II.

The Decision Below Is Not In Conflict With Courts Of Appeals Decisions

The petition marshalls 10 cases of courts of appeals which it asserts to be in conflict with the decision below (Pet. 8, 10) in relation to "want of a claim of money damages". (Pet. 8) and the Declaratory Judgment Act not applying to suits against the United States (Pet. 10). These issues were weighed in the decision below (Pet. 4A-8A). None of the cases cited in the petition represents a conflict of decision, either in terms of the issues decided or the language used, especially in the light of the 1948 Code revision.

In eight of these cases the underlying controversy was held to be outside the court's jurisdiction. The actions were to compel employment in the Government,[22] to assert in the district court pay and compensation claims which by the Tucker Act at the time (1945, 1954) were confined exclusively to the Court of Claims,[23] to review agency action where the statute precluded, or was thought to preclude, review,[24] to fix for federal tax purposes the allocation of partnership income,[25] to declare the good time allowance of a federal prisoner who had not exhausted his administrative remedies and presented no actual contro-

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[22] *Love* v. *United States*, 108 F.2d 43 (CA 8, 1939), cert. denied, 309 U.S. 673 (1940).

[23] *DiBenedetto* v. *Morgenthau*, 148 F.2d 223 (CA DC, 1945); *Powers* v. *United States*, 218 F.2d 828 (CA 7, 1954). 28 U.S.C. § 1346(d)(2) was amended by P.L. 88-519, 78 Stat. 699, August 30, 1964, which eliminated provisions which prohibited district courts from exercising jurisdiction of civil actions or claims (up to $10,000.00 as provided in 28 U.S.C. § 1346(a)(2)) to recover fees, salary, or compensation for official services of officers or employees of the United States.

[24] *Wells* v. *United States*, 280 F.2d 275 (CA 9, 1960).

[25] *Wilson* v. *Wilson*, 141 F.2d 599 (CA 4, 1944).

versy [26] to prevent the sale of Government-owned property,[27] and to declare wheat quota legislation unconstitutional.[28] The ninth case involved a suit for specific relief of an equitable character (i.e. to declare void an assignment of certain letters patent).[29] The tenth case involved a claim where judicial review was expressly prohibited by the statute under which benefits were claimed.[30] From the premise that there was no jurisdiction of the subject matter, neither the court below nor the respondent would reach a different result in that regard.

In the five cases cited in the petition (Pet. 8) relative to a "want of a claim for money damages",[31] one involved a claim where judicial review was expressly prohibited;[32] two did not involve claims for money damages;[33] and two involved claims which by the Tucker Act at the time (1945, 1954) were confined exclusively to the Court of Claims.[34]

The petition cites eight cases (Pet. 10) in relation to the Declaratory Judgment Act not applying to the United States.[35] Four of the cases [36] were decided before the 1948

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[26] *Gibson* v. *United States*, 161 F.2d 973 (CA 6, 1947).

[27] *Anderson* v. *United States*, 229 F.2d 675 (CA 5, 1956).

[28] *Stout* v. *United States*, 229 F.2d 918 (CA 2, 1956).

[29] *Clay* v. *United States*, 210 F.2d 686 (CADC, 1953) (cert. denied, 347 U.S. 927 (1954)).

[30] *Blanc* v. *United States*, 244 F.2d 708 (CA 2, 1957) (cert. denied, 355 U.S. 874 (1957)).

[31] *Blanc*, note 30; *Anderson*, note 27; *DiBenedetto*, note 23; *Powers*, note 23; *Clay*, note 29.

[32] *Blanc*, note 30.

[33] *Anderson*, note 27; *Clay*, note 29.

[34] *DiBenedetto*, note 23; *Powers*, note 23.

[35] *Stout* (1956), note 28; *Wilson* (1944), note 25; *Anderson* (1956), note 27; *Powers* (1954), note 23; *Love* (1939), note 22; *Wells*, note 24; *DiBendetto* (1945), note 23; and *Gibson* (1947), note 26.

[36] *Love* (1939), note 22; *Wilson* (1944), note 25; *DiBenedetto* (1945), note 23; *Gibson* (1947), note 26.

Code revision relative to the Declaratory Judgment Act applying to "any" court of the United States. The four other cases [37] did not comment on the 1948 change in the Declaratory Judgment Act providing that "any" court of the United States may grant declaratory relief which includes the Court of Claims. This argument also ignores petitioner's own recognition that the Declaratory Judgment Act applies to petitioner as evidenced by the cases wherein it has itself initiated suits for declaratory relief such as was filed by petitioner in the United States District Court for the District of Columbia on September 27, 1968,[38] 24 days before it filed its petition in this case.

From the foregoing, it is abundantly clear there is no conflict between the decision below and the cases relied on by petitioner. No more is any conflict likely to arise, or need arise, in the future. The Court of Claims will normally be accepted as authoritative with respect to practice under the Tucker Act, and the opinion of Judge Davis would in any event compel respect.

III.

Decision Of Small Importance To Government's Functions Or Operations

The decision below, in holding that the Declaratory Judgment Act applies to the United States Court of Claims, does not present an issue of general importance nor does it present any special or important reasons to warrant exercise of the Court's jurisdiction. Founded upon a most exhausive assessment of governing law and precedent the decision below merely represents the resolution of the very narrow point that the Declaratory Judgment Act applies to the United States Court of Claims in proceedings within its jurisdiction as set forth in 28

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[37] *Powers* (1954), note 23; *Stout* (1956), note 28; *Anderson* (1956), note 27; *Wells* (1960), note 24.

[38] *United States* v. *Reynolds Metals Company, supra*, note 10.

U.S.C. § 1491. The decision below demonstrates that the United States Court of Claims, as in the case of "any" other "court of the United States" may employ this "additional procedural tool" to matters within its jurisdiction. Contrary to petitioner's assertion (Pet. 5) the Court of Claims has not decided "an important jurisdictional issue in a manner that materially enlarges the subject matter jurisdiction which it has traditionally exercised under the Tucker Act, 28 U.S.C. § 1491". There is nothing in the decision below to suggest, indicate, or infer the Court will, or intends to, adjudicate matters beyond its jurisdiction. Specifically, in this regard, the Court of Claims pointed out that "use of the Declaratory Judgment Act need not, and will not, be used to expand the classes of claims or issues which this court may consider" (Pet. 19A).

In petitioner's endeavor to overcome the patent showing in the decision below that the Declaratory Judgment Act does apply to the United States Court of Claims, it is noteworthy that in its first application (of August 30, 1968) for an extension of time within which to file its petition for a writ of certiorari petitioner advanced as its sole ground:

> "It has been necessary to consult numerous Federal agencies in order to determine the potential impact of this decision. Additional time is required to allow study of these views and, if it is decided to file a petition, to prepare and print it."

The petition is devoid of a showing the decision below has generated, or will generate, any "potential impact" (to say nothing of an actual impact), as shown by consultation with "numerous federal agencies", upon petitioner's functions or operations. In connection with petitioner's attempt to show an involvement in "a broad variety of cases not involving claims for money damages" (Pet. 11-12), it appears that the Court of Claims had authorized

two plaintiffs an opportunity to amend their complaints to seek declaratory relief. In one, *Paulsen* v. *United States*, Ct.Cl. No. 327-67, the amended petition seeks credit for alleged involuntary sick leave or, in the alternative, $636.00 for a specific involuntary leave period. The other case, *Wilkerson* v. *United States*, Ct.Cl. No. 137-65, involved a claim for widow's benefits as affected by a discharge alleged to be wrongful.[39] The Government in each of the three maritime cases [40]—which involve money claims, and include a prayer for declaratory relief (Pet. 12) had on October 1, 1968 moved for summary judgment on the ground that the cause of action was non-justiciable. If it is right, the suits are not saved by the declaratory prayer. If the Government is wrong, there is no discernible harm to anyone in litigating a claim when it is fresh rather than awaiting the slow maturing of a specific money claim—after performance, audit, vouchers and refusals—some years later.[41] By the same token, no ground for apprehension is seen if federal contract claims could be settled by declaratory judgment even though "not giving rise to a ripe claim of money damages because the contract is not yet completed" (Pet. 13). It is supposed that if the sovereign consents to suit it would hardly comport with its dignity were it to urge that it meant to consent only to a long-delayed suit. As the Court stated in *Glidden Co.* v. *Zdanok*, *supra*, in quoting from President Lincoln's State of the Union message in 1861: "It is as

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[39] In *Wilkerson*, a judgment was entered for plaintiff in the amount of $2,916.00 on October 4, 1968 based on a stipulation filed October 1, 1968 wherein plaintiff agreed to accept $2,916.00 in [illegible] settlement of the claim. Obviously, this was a claim with a "m[illegible] cast" or was a "money related" claim.

[40] *American Export Isbrandsten Lines, Inc.* v. *United States*, Ct. Cl. No. 75-68; *American President Lines, Ltd.* v. *United States*, Ct. Cl. No. 55-68; *Delta Steamship Lines, Inc.* v. *United States*, Ct. Cl. No. 74-68.

[41] Respondent does not, after *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963), understand petitioner's concern that the plaintiffs seem to be seeking what "would essentially constitute a remand by the Court of Claims to the administrative agency" (Pet. 12).

much the duty of the Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals" (370 U.S. at Page 553).

With regard to petitioner's reference to "[o]ther examples" of the Court having "enlarged its jurisdiction" or possibly enlarging its jurisdiction by considering cases pertaining to federal tax liabilities, and citing respondent's case as being indicative of same (Pet. 13), reference need only be made to the keen awareness of the Court of Claims of the exclusion of cases "with respect to federal taxes" in the Declaratory Judgment Act as evidenced in the opinion below (Pet. 29A-30A).

In the ultimate, a review of all of the points and authorities raised by petitioner fails to affirmatively show the decision below was in error in holding that the Declaratory Judgment Act does apply to the United States Court of Claims or that in availing itself of this remedy it will engage in matters beyond the subject matter of its jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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